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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re

GERARD A. TURRO

MM Docket No. 97-122

For Renewal of License
for FM Translator Stations
W276AQ(FM), Fort Lee, NJ, and
W232AL(FM), Pomona, NY

File Nos. BRFT-970129YC
BRFT-970129YD

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MONTICELLO MOUNTAINTOP
BROADCASTING, INC.

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Order to Show Cause Why the Construction
Permit for FM Radio Station WJUX(FM),
Monticello, NY, Should Not Be Revoked

APR 3 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Honorable Arthur I. Steinberg
Administrative Law Judge

MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau

Norman Goldstein
Chief, Complaints & Political Programming Branch

Alan E. Aronowitz
Suzan B. Friedman
Attorneys

Federal Communications Commission
2025 M Street, N.W., Suite 8210
Washington, D.C. 20554
(202) 418-1430

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I. Summary

The Bureau demonstrated in its Proposed Findings of Fact and Conclusions of Law ("PFCs") that all the issues designated in the Hearing Designation Order ("*HDO*") should be resolved adversely against Gerard A. Turro ("Turro") and Monticello Mountaintop Broadcasting, Inc. ("MMBI"). The Bureau's PFCs clearly show that Turro violated Sections 74.531(c) and 74.1231(b) of the Commission's Rules with respect to his operation of FM Translator Stations W276AQ, Fort Lee, New Jersey, and W232AL, Pomona, New York. In addition, the evidence supports a conclusion that Turro and Weis engaged in an unauthorized transfer of control of WJUX (FM), Monticello, New York, in violation of Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission's Rules. Further, MMBI violated Sections 73.1120 and 73.1125(a) and (c) of the Commission's Rules by failing to maintain a main studio. Finally, both Turro and Weis misrepresented facts and lacked candor with respect to these violations in their dealings before the Commission and in the course of their testimony at the hearing.

Neither Turro nor MMBI's PFCs alter the Bureau's ultimate conclusion that Turro and Weis lack the requisite qualifications to be or remain Commission licensees. Accordingly, the Presiding Judge should issue an initial decision denying Turro's applications for renewal of his translator stations and revoking MMBI's construction permit for WJUX.

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To: Honorable Arthur I. Steinberg		
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MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On March 13, 1998, Gerard A. Turro ("Turro"), Monticello Mountaintop Broadcasting, Inc. ("MMBI"), Universal Broadcasting of New York, Inc. ("Universal"), and the Mass Media Bureau ("Bureau") filed Proposed Findings of Fact and Conclusions of Law ("PFCs") in the above-captioned proceeding. The Bureau hereby responds to Turro's and MMBI's PFCs. The Bureau's failure to reply to any particular finding or conclusion should not be construed as a concession to its accuracy or completeness. The Bureau submits that its findings of fact are an accurate and complete presentation of the relevant record evidence and its conclusions of law properly apply Commission precedent in light of the record.

I. Reply to Proposed Findings of Fact and Conclusions of Law

A. Intercity Relay Station and Translator Operations

2. At ¶¶ 435-441 of his PFCs, Turro argues that his use of Intercity Relay ("ICR") station WMG-499 was in accord with the Commission's rules. In this regard, Turro observes that he applied for and the Commission granted him authority to operate the ICR in order to provide 30-second promotional announcements and operational communications from the Dumont studios of Jukebox Radio to Station W276AQ, Fort Lee, New Jersey (the "Fort Lee translator"). Next, Turro notes that Section 74.1231(g) of the Commission's Rules allows an FM translator to transmit emergency messages and solicitations for financial support, while Section 74.531(f) of the Commission's Rules provides that multiplexing of an intercity relay station may be employed to provide, *inter alia*, operational communications. Finally, Turro states that the ICR was used to carry telemetry for remote control of the Fort Lee translator from Dumont, and was available to provide emergency messages to the Fort Lee translator, but was never used to provide programming to that translator. Based on the foregoing, Turro concludes that his operation of the ICR was consistent with the Commission's rules.

3. With respect to the possible violation of Section 74.531(c) of the Commission's Rules, Turro's argument is disingenuous. The ICR license was issued in conjunction with the operation of noncommercial educational station. WJUX (later WNJW), Franklin Lakes, New Jersey (hereafter referred to as WNJW), *not* commercial station WXTM (later WJUX),

Monticello, New York (hereafter referred to as WJUX).¹ See Bureau PFCs at ¶¶ 24, 29. As discussed below, the applicable rules did not authorize Turro's use of the ICR for telemetry to control the Fort Lee translator in conjunction with the operation of WJUX, nor did they permit Turro to transmit WJUX programming to the Fort Lee translator via the ICR.

4. At all times relevant to this proceeding, Sections 74.501(b), 74.531(b-d, f-g), 74.532, and 74.1201 *et seq.* of the Commission's Rules authorized use of an ICR to transmit program material between noncommercial educational FM radio stations and their co-owned noncommercial educational FM translator stations, provided that such translators operate on reserved Channels 201 to 220. Thus, notwithstanding the initial grant of his ICR application, Turro could not operate the ICR consistent with the rules given the Fort Lee translator's operation on Channel 276.

5. Moreover, once the Fort Lee translator ceased rebroadcasting noncommercial educational station WNJW and began to rebroadcast commercial station WJUX, Turro had no authority or right under the rules to use the ICR at his discretion for *any* purpose.² In this

¹ However, even with respect to the initial grant, the Commission's staff eventually determined that the ICR was incorrectly issued. Moreover, after learning of Turro's continued use of the ICR between Jukebox Radio's Dumont studio and the Fort Lee translator *after* the Franklin Lakes station went silent, the staff informed Turro that the ICR was not being used as initially authorized. Turro did not challenge or otherwise appeal these staff conclusions. Bureau PFCs at ¶ 29.

² Turro initially applied for the ICR to operate between WNJW's then main studio in Dumont and the Fort Lee translator in conjunction with the operation of noncommercial station WNJW. That however does not confer blanket authority to use the ICR for any purpose between those two points.

regard, Sections 74.501(b) and 74.531 of the Commission's Rules limit ICR transmissions to those between an FM radio station and FM translator stations operating within the coverage contour (that is, the predicted 1 mV/m contour) of their primary station. *See Amendment of Part 74 - FM Translators*, 5 FCC Rcd 7212, 7214 (1990). As the record makes clear, Bergen County, New Jersey, and, hence, Turro's Fort Lee translator, is wholly outside the 1 mV/m contour of WJUX. Universal PFCs at ¶ 38.

6. Without regard to how the ICR was originally authorized, Turro claimed that after October 1994, he used the ICR primarily for telemetry between Dumont and Fort Lee. While the above-referenced rules authorize multiplexing for the transmission of a variety of communications, which encompass operational communications, including special signals used for telemetry or control of equipment used in conjunction with the broadcast operations, Section 74.531(f) of the Commission's Rules specifically states that an ICR may not be operated *solely* for such purposes. That rule clearly contemplates a secondary or incidental use of an ICR for telemetry purposes attendant to an otherwise proper and authorized use. Turro's admitted use of the ICR from October 1994, until it was deactivated was solely and primarily to provide telemetry and thus constitutes an impermissible use of that facility. Accordingly, even if Turro's claim that he never used the ICR to transmit WJUX programming to the Fort Lee translator is accepted, his admitted use of the ICR for telemetry from October 1994 until July 1995 was contrary to Section 74.531 of the Commission's Rules.

7. Nevertheless, as the record evidence demonstrates, the Fort Lee translator also rebroadcast the aural program material provided by the ICR. In this regard, the testimony of Serge Loginow, Vincent Luna and William Gaghan establish that at various times between October 1994 and July 1995, the Fort Lee translator did not rebroadcast the over-the-air signal of either WJUX or W232AL, Pomona, New York (the "Pomona translator"), but instead rebroadcast the higher quality microwave signal of the ICR. *See* Bureau PFCs at ¶¶ 33-4. The rebroadcasting of the ICR by the Fort Lee translator thus violated not only Section 74.531(c) but also Section 74.1231(b) of the Commission's Rules.

8. Turro's claims that no such rebroadcasting occurred are nothing short of incredible. In this regard, the evidence proffered by Turro to support a conclusion that the Fort Lee translator received all of its programming off the air from WJUX or from the Pomona translator involved events that occurred *after* the ICR was shut down and after the issuance of the Bureau's Letter of Inquiry "LOI") to Turro about his operations. These events have little probative impact as to what was occurring while the ICR was operating. With respect to events which occurred contemporaneously with the use of the ICR, the appropriate inference to be drawn is that Turro regularly used the ICR to deliver WJUX programming to the Fort Lee translator instead of over-the-air delivery of such programming from WJUX or the Pomona translator while he tried to determine what methods would best ensure receipt of a consistently good audio signal by the Fort Lee translator. In this particular regard, there is no other rational explanation for the multiple antennae, delivery and filtering systems used by Turro between the autumn of 1994 and the summer of 1995 in conjunction with the operation

of the Fort Lee translator (*see, e.g.*, Universal PFCs at p. 6, n. 5 and ¶¶ 17-18; Turro PFCs at ¶¶ 88-94).

9. In any event, notwithstanding the elaborate engineering used in connection with the Fort Lee translator, Turro unequivocally testified that his system was designed so that if the complete ICR signal were blocked, the Fort Lee translator would seek out the Pomona or Monticello station's over-the-air signal. Bureau PFCs at ¶ 28; Turro PFCs at ¶ 247. However, when Loginow blocked the ICR signal on May 15, 1995, the Fort Lee translator did not rebroadcast the over-the-air signal of either the Pomona translator or WJUX. Rather, broadcast of the Jukebox Radio programming transmissions over the Fort Lee translator ceased. Likewise, when Loginow stopped blocking the signal of the ICR, Jukebox Radio programming resumed on the Fort Lee translator. Bureau PFCs at ¶ 32, Universal PFCs at ¶ 13. Thus, on May 15, 1995, the Fort Lee translator failed to seek out and rebroadcast the over-the-air signal of the Pomona translator upon blockage of the ICR signal contrary to Turro's claim as to what should have happened. The only rational conclusion one can draw is that Turro used the ICR to deliver programming directly to the Fort Lee translator and that, hence, the Fort Lee translator did not receive the programming off-the-air from either WJUX or the Pomona translator. Accordingly, in addition to violating Section 73.531(c) of the Commission's Rules, Turro violated Section 74.1231(b) of the Commission's Rules.

B. 1991 Bureau Letter

10. At ¶¶ 495-496 of his PFCs, Turro contends that he acted in "reasonable reliance" on the Bureau's November 19, 1991, letter ("1991 Bureau Letter") when he entered

into the "network affiliation" with MMBI. At ¶ 73 of its PFCs, MMBI argues that, although Weis did not know the distinction between time brokerage and network affiliation, he did focus on the word "agreement" in the 1991 Bureau Letter and believed that that word covered *whatever* arrangement he might have with Turro. Both parties cite footnote 13 of the *HDO*³ in this proceeding for the proposition that their conclusions are "not unreasonable."

11. Turro and MMBI are wrong. Footnote 13 of the *HDO* merely explained the basis for not adding issues against these parties relating to a potential violation of Section 74.1232(d) with respect to relationships between the licensee of a full-service FM station and the licensee of a translator that rebroadcasts that FM station. The Bureau's PFCs not only demonstrate that, given his prior attempts to obtain program origination authority for the Fort Lee translator, Turro was not candid in procuring the 1991 Bureau Letter, but that Turro's interpretation of that letter to rationalize what he did is unreasonable. Similarly, it is patently unreasonable to interpret that letter, as MMBI apparently does, to permit *any* arrangement MMBI and Turro might agree to in the context of these stations. Finally, there is no support in law or logic for the suggestion that footnote 13 of the *HDO* authorized or condoned an unauthorized transfer of control of WJUX.

C. Post "Spotlight"

12. The Bureau's PFCs, at ¶ 102, establish that during the winter of 1995, Turro became aware that Universal was openly questioning the legality of the Jukebox Radio

³ *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing*, 12 FCC Rcd 6264 (1997).

operation. Clearly, after the FCC inspections in April 1995, both Turro and MMBI were fully aware that the FCC had concerns about that operation. Turro himself concluded that Universal or the FCC was behind the May 1995, "jamming incident" involving the ICR and the Fort Lee translator. *See* Bureau PFCs, at ¶ 36. Although it is not entirely clear exactly when Turro's and MMBI's attorneys obtained a copy of Universal's complaint to the Commission, both Turro and MMBI knew that they were in the "spotlight" after the Bureau issued the June 1995, Letters of Inquiry ("LOI"). Throughout their PFCs, Turro and MMBI point to a host of "post-spotlight" actions to demonstrate compliance with the rules (*e.g.*, August 2, 1995, demonstrations of the translator's operations; more programming directed to Sullivan County than was the case between October 1994, and July 1995;⁴ installation of a telephone at WJUX's alleged main studio immediately following the issuance of the LOIs; construction of a new main studio for WJUX; the origination of two political advertisements from the WJUX main studio in 1997). However, all "post-spotlight" improvements must be discredited. There is little, if any, probative value attached to exculpatory evidence occurring after notice is given that an application is in jeopardy or under scrutiny, *i.e.*, after the "spotlight" is on. *See RKO General, Inc.*, 35 FCC 2d 100, 103 (1972). Similarly, the testimony and conclusions of those without personal knowledge of the matters alleged (*e.g.*, Hurst's conclusions based on what he was told by Turro) must be likewise discounted.

⁴ MMBI states in its PFCs at ¶ 17 that Turro estimated that currently 60% of WJUX's programs were directed towards Sullivan County. However, when asked what percentage of such programs were aired between October 1994, and August 1995, Turro claimed "couldn't accurately answer" that question. Tr. 2049-50.

D. Witness Credibility

13. At ¶ 38 of its PFCs, MMBI suggests that any misimpressions created concerning the operation of WJUX are the fault of Loginow, the FCC field engineer, who "seems to have asked ineptly worded questions, misunderstood statements made to him, and failed to ask obvious follow-up questions." Suffice it to say that Loginow's questions were sufficiently clear and his investigative techniques were sound enough to elicit relevant information. Furthermore, it is the burden of a Commission licensee or permittee to be forthright with the Commission. The Commission should not be obligated to obtain information from licensees who engage in semantic word games or elaborate shell-games. *See* Bureau's PFCs, ¶¶ 167, 186. Frankly, MMBI's thin attempt to shift that burden is most revealing and further demonstrates that MMBI cannot be trusted to be truthful with the Commission in the future.

14. Similarly, at ¶¶ 501-537 of his PFCs, Turro assails the credibility of Luna and Gaghan. However, the overall credibility of their testimony -- particularly that which they personally heard and observed -- is not undermined significantly by Turro's attempts to point out the vagaries of their memories on relatively minor technical points of a convoluted transmission system. Moreover, Luna and Gaghan were forthright and candid in describing their past experiences with, as well as their past and current feelings toward Turro, which will be assessed by the Presiding Judge. Indeed, Turro's PFCs tend to place his word squarely against those not or no longer in his (or MMBI's) employ.

15. In that particular regard, the Bureau's PFCs established that Turro's overly literal or evasive responses to Commission inquiries raise further questions concerning his own credibility, a concern that continues in his PFCs. For example, Turro states at ¶ 490 of his PFCs, that he "had to look to Mr. Weis, Mr. Blabey or Ms. Montana if he needed anything in connection with [WJUX]." Even if that simple statement were true, the clear weight of the evidence demonstrates that, after WJUX began broadcast operations, he did not *need* them for anything until after the FCC began its inquiry. In any event, Turro's credibility is more problematic when relied upon for matters for which there is no independent proof or authentication. For example, at ¶ 265 of his PFCs, Turro offers only his opinion for the conclusion that Loginow's signal generator could not reach the basement of Mediterranean Towers to block an alleged incoming signal of the Pomona translator on equipment no one but Turro ever personally observed or inspected.

E. Main Studio

16. In its findings at ¶¶ 28-38 and related conclusions at ¶¶ 5-8 and 11-17, MMBI contends that Eugene Blabey ("Blabey") and Carol Montana "Montana") provide an adequate managerial and staff presence at the WJUX "main" studio. MMBI is wrong. As the record makes clear, Blabey and Montana do not function now and have never functioned as WJUX "employees." Rather, they perform various administrative duties for WJUX as an adjunct to their duties for WVOS.

17. Under no reasonable interpretation of the facts could Blabey and Montana be viewed as WJUX's "General Manager" and "Public Affairs Director," respectively. There is

no indication they have any control over the Dumont personnel who regularly operate WJUX. With the exception of two political advertisements sold in 1997, they have neither sold nor supervised anyone who did sell air time on WJUX. Bureau PFCs at ¶ 77. They do not control what is aired on WJUX. Indeed, programming decisions even as to public affairs programs and public service announcements are ultimately controlled by personnel at Dumont. Bureau PFCs at ¶¶ 71, 89.

18. In its conclusions at ¶ 13, MMBI cites *KQQK, Inc.*, 10 FCC Red 132 (MMB 1994), for the proposition that the Bureau found that the mere fact that an individual held managerial positions at two stations did not automatically preclude him from having a meaningful managerial presence at one of them. Therefore, MMBI contends that Blabey can function as both the general manager of WVOS (AM&FM) and WJUX. However, in *KQQK*, the Bureau determined that KQQK had failed to show that the person in question held a meaningful managerial position at KQQK and did not base its decision on the fact that the purported general manager supposedly held two such positions. *Id.* Thus, *KQQK* supports the Bureau's position the duties performed by Blabey and Montana do not meet the Commission's standards for a meaningful managerial presence as the record in this proceeding is devoid of evidence that either of them "was authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales or emergency procedures." *Id.* at 132.⁵ Since the Commission's emphasis is on job duties, rather than job titles (*see*

⁵ In *KQQK*, the Bureau stated that if the "general manager" had a managerial role at both stations, it would have cross-interest implications. *Id.* at n. 1. Therefore, if Blabey was found to hold managerial roles at WVOS (AM&FM) and WJUX, there likewise would be a

Jones Eastern of the Outer Banks, Inc., 7 FCC Red 6800, 6802 n.9 (1992)), it must be concluded that Blabey's and Montana's job titles are meaningless and that WJUX lacks the requisite "meaningful management and staff presence" at its purported main studio. *Id.*, 7 FCC Red at 6801 ¶ 9.

F. The Network Affiliation Agreement

19. In its proposed findings of fact at ¶¶ 68 and 80 and related conclusions of law at ¶¶ 34-35, MMBI attempts to rewrite the Network Affiliation Agreement ("NAA"). Specifically, MMBI argues that the indemnification provision in the NAA limits the Network's (read, Turro's) liability with respect to FCC fines and MMBI's legal fees.⁶ However, the NAA states that Jukebox Radio "agrees to indemnify MMBI and hold it harmless from *any and all* fines, surcharges, forfeitures, levies, and any other monetary damages imposed by the F.C.C." MMB Ex. 4. p. 85 (emphasis added).⁷ It is clear from a plain reading of the NAA that Jukebox Radio is obligated to reimburse MMBI for any fines or forfeitures, for whatever infraction, that may be assessed by the Commission. There are absolutely no limitations on Jukebox Radio's liability set forth in the NAA, nor is there any obligation on the part of MMBI for such payments. The document speaks for itself. Therefore, MMBI's and Turro's interpretations of the extent of Jukebox Radio's liability

cross-ownership issue; if he is found not to have a managerial role at WJUX, then MMBI must be found in violation of the main studio rules. This scenario could further explain why Blabey chose to be a "consultant" rather than an employee of WJUX.

⁶ Turro essentially agrees with MMBI's arguments. See Turro's PFCs at ¶ 385.

⁷ Similar language appears in the Guaranty of Payment signed by Turro on October 17, 1994. See Bureau PFCs at ¶ 65.

should be rejected.

20. In its proposed findings of fact at ¶¶ 69-70 and related conclusions of law at ¶ 29, MMBI claims that the amendment to the NAA ("Amended NAA") was prepared in November 1994, by counsel and that its preparation was unrelated to the Commission's inspections that occurred in 1995. Further, MMBI contends that the NAA fully complied with FCC policy and that the Amended NAA's purpose was merely to define better or clarify the parties' rights and responsibilities. The question of when the Amended NAA was prepared is of little moment; a more significant event is the timing of its execution. Moreover, the weight of the evidence indicates that the Amended NAA was a belated effort to legitimize the flawed arrangement between Turro and MMBI.

21. The Amended NAA was executed on July 17, 1995, shortly after the Commission's inspections. Bureau PFCs at ¶ 73. Although Turro and Weis testified that the Amended NAA had been prepared earlier by counsel, they provided no documentary evidence in support of their self-serving testimony. In any event, the more significant point is that the parties did not make any effort to change their legal relationship until after the "spotlight" was turned in their direction. In this regard, the Amended NAA, unlike the original NAA, gives MMBI the right to delete or preempt programming. Bureau PFCs at ¶ 70. Thus, the Amended NAA did not merely clarify the parties' rights. It gave MMBI a right the original

NAA did not, namely, control over WJUX's programming.⁸ The foregoing, in conjunction with the circumstances surrounding WJUX's purchase and construction (Bureau PFCs at ¶¶ 43-46, 50-51, 58-67), clearly indicates that the timing of the execution of the Amended NAA by Turro and MMBI was nothing more than a facile attempt to cover their tracks and have it appear that MMBI, not Turro, ultimately controlled the operation and programming of WJUX.

22. In its conclusions of law at ¶ 32, MMBI contends that Weis controls its finances and that he is responsible for them. While this may be the case, such a contention is beside the point because it is Turro who provides all the funds to operate WJUX. As the Bureau demonstrated in its PFCs, MMBI has no station but for Turro's money and programming. WJUX could not operate, and in fact would not even exist, without Turro. Therefore, Turro controls WJUX; MMBI does not.

23. Just as unfounded is MMBI's argument that if Weis decided to make expenditures that exceeded the monthly payments, Turro was under no obligation to make up the shortfall. MMBI Conclusions at ¶ 32. However, Weis testified that there was no month when the station's expenses exceeded the monthly payments. Tr. 1365-66. When he decided to purchase additional equipment, one of the few decisions he actually made for the station, he simply told Turro of the added expense and Turro paid. Tr. 1366-68. Weis made it abundantly clear that he agreed to purchase the construction permit in order to make some

⁸ Significantly, MMBI exercised this right only through the submission of tapes of programs already aired on WVOX and the submission of a community bulletin board, the airing of which was ultimately controlled by Turro. Bureau PFCs at ¶¶ 71, 89.

money. MMBI Ex. 1, p. 2; Tr. 1345. It is unlikely that he would then act in a manner contrary to that goal. In any event, MMBI's contentions in this regard are contrary to the record evidence.

G. Misrepresentation and Lack of Candor

24. In ¶ 99 of its proposed findings of fact, MMBI argues that other than Weis' statement concerning telephone service at the WJUX studio, he made no other misstatements to the Bureau in his response to the Bureau's LOL. The Bureau disagrees. A review of MMBI's response reveals numerous examples of misrepresentations or lack of candor. First, while Weis states that he provided all the funds used to purchase equipment and to construct WJUX and that he paid all the station's operating expenses, he failed to disclose the critical fact that all such funds came from Turro. MMB Ex. 11, pp. 161-65. Second, Weis falsely asserted that he "controlled what is or is not broadcast, in accordance with the terms of the October 17, 1994 Network Affiliation Agreement . . ." (*Id.* at 162) and that he was "solely responsible for WJUX(FM)'s programming policies . . ." *Id.* at 165. The reality was that the NAA did not grant Weis any control over programming. In fact, the NAA provides that Jukebox Radio will provide 100 percent of the programming, with no exceptions. MMB Ex. 11, p. 216-17. Moreover, the parties actions, both before and after MMBI's response, belie the claim that Weis controlled WJUX's programming. Accordingly, Weis made a number of misrepresentations and lacked candor to the Commission in his response to the LOL.

25. Likewise, in his PFC at ¶ 383, Turro claims that he had no control over the operations or finances of the Monticello station. However, it is abundantly clear from the

record that Turro in fact was directly involved in the operations of the station and that he provided all the funding for the purchase, construction, programming, and operation of WJUX. Bureau PFCs at ¶¶ 46, 58-71, 77-79, 89, 93, 109, 117. Turro lied in his LOI response and he has continued to dissemble throughout this proceeding.

26. In ¶ 30 of its conclusions of law, MMBI contends that the NAA is akin to arrangements between licensees and program providers which have been approved by the Commission. While MMBI's general statement is correct, the Commission has also required that a licensee who enters into such an agreement must retain the ultimate control over programming and over ascertaining the needs and interests of its community of license. *See* Bureau PFCs at ¶ 137 and cases cited therein. As stated above, the NAA contained no such provisions nor did MMBI ever exercise such control over either programming or ascertaining community needs. The Amended NAA contained these critical provisions, but, as Weis admitted, he saw little difference between the NAA and Amended NAA and he did not alter his activities with respect to management of WJUX as a result of the amendment.

27. MMBI reaches the conclusion that WJUX's programming met the needs of its community of license and thus did not violate Section 73.1120 of the Commission's Rules, citing *WHYY, Inc.*, 93 FCC 2d 1086, 1094 (1983). In this regard, MMBI claims that WJUX regularly broadcast PSAs and public affairs programs of interest to its service area. MMBI conclusions of law at ¶ 24. In *WHYY*, the Commission found that while *WHYY* had reduced the amount of public interest programming, it continued to provide a sufficient amount of

such programming - 3 - 3 ½ hours per week - to fulfill its public interest requirements and to treat Wilmington as its primary service area. *Id.* at 1095. Here, the Bureau pointed out that, according to MMBI's Issues and Programs Lists (MMBI Ex. 3, p. 2 - 36) there was a paucity of public interest programming directed to WJUX's community of license until after MMBI became aware that the Commission was investigating its activities. With few exceptions, the public interest programming supplied by WJUX consisted merely of re-broadcasts of WVOS programs that Blabey provided. Bureau's PFCs at ¶ 142. Furthermore, the evidence shows that from the start, Turro intended, and Weis knew, that WJUX was to be a Bergen County, New Jersey station. *Id.* at ¶¶ 46, 56.

H. Unauthorized Transfer of Control

28. MMBI also contends that Weis and Turro did not engage in an unauthorized transfer of control because there is no evidence to refute Weis' claim that he is the sole owner of MMBI, and that Turro has never had any ownership interest. In addition, MMBI states that the Bureau offered no evidence of any "secret agreement" to that effect. MMBI conclusions of law at ¶ 25. The Bureau does not dispute MMBI's claim that "on paper", Weis is the sole owner of MMBI and that Turro has no explicit ownership interest in the station. However, the fact remains that Turro has control over WJUX by virtue of his power over the finances, programming, and day-to-day operation and management. In addition, Turro set out to establish a radio station for the express purpose of broadcasting his Jukebox Radio format to Bergen County, New Jersey. He could not own WJUX under FCC rules; so he set up his friend Weis to stand in his place. Therefore, Weis' role was merely to be the *de jure* owner of WJUX, not the *de facto* one.

29. MMBI argues that because the NAA bound the parties to comply with FCC rules and regulations, and Weis did not seek or obtain FCC consent to transfer control of WJUX, no such transfer took place. MMBI conclusions of law at ¶ 28. Furthermore, MMBI asserts that the Amended NAA confers ultimate control over WJUX to MMBI. *Id.* at ¶ 29. Neither of these arguments should be afforded any weight. The fact that MMBI did not seek or obtain FCC consent to transfer control of WJUX is not evidence that an unauthorized transfer of control did not take place. Rather, Weis and Turro engaged in an unauthorized transfer of control because Turro assumed control over WJUX *without* such authority. The language of the NAA supports a conclusion that Weis abdicated control over the station to Turro from the time of the purchase of the construction permit. As discussed previously, the Amended NAA was signed only when the spotlight was on Turro and Weis and counsel advised them to sign the amendment in an effort to show compliance with FCC policy.

30. In its conclusions of law at ¶ 30, MMBI cites *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997) ("Choctaw") and *Gisela Huberman, Esq.*, 6 FCC Rcd 5397 (MMB 1991) for the proposition that the Commission has sanctioned time brokerage agreements or local marketing agreements ("LMA") in which the licensee makes airtime available to the broker in exchange for payments. *Choctaw, supra*, 12 FCC Rcd at 8539. *Choctaw*, however, offers support for the Bureau's conclusion that the NAA did not comport with Commission policy with respect to such agreements because Weis did not retain ultimate control over programming. In *Choctaw*, the LMA specifically provided that the licensee was responsible for monitoring the station's programming and for preparing up to three hours per

week of programming material responsive to the needs and interests of its community of license. Furthermore, the licensee retained the explicit right to reject programming and to terminate the LMA if at any time it believed the agreement to be contrary to the public interest. *Id.* As the Bureau has repeatedly shown in its PFCs and herein in its Reply, the NAA lacked any provisions granting Weis any control over programming or any means of terminating the agreement. There is no evidence that he ever considered any format other than Turro's or made any kind of "choice" with respect to a programming format for WJUX.

31. MMBI also cites *Choctaw, supra*, 12 FCC Rcd at 8541, in support of its conclusion that MMBI meets the Commission's standards of licensee control over a station's finances. MMBI conclusions of law at ¶ 34. MMBI contends that regardless of the terms of the NAA and the Guaranty of Payment, it remains responsible for the station's financial obligations. In *Choctaw*, however, the Commission quoted language from *WGPR, Inc.*, 10 FCC Rcd 8140 (1995), the same case cited by the Bureau in its PFCs at ¶ 135, which establishes that while it is permissible for a time brokerage agreement to give the broker airtime in exchange for the broker paying for the station's fixed and operating costs plus a built-in profit, the licensee must be able to operate independently of the broker and retain "ultimate decision-making authority." *Choctaw, supra* 12 FCC Rcd at 8541, citing *WGPR, supra*, 10 FCC Rcd at 8145. Again, there is ample evidence that Weis could not operate independently of Turro and did not retain "ultimate decision-making authority."

I. Procedural Issues

32. In its conclusions of law at ¶¶ 52-55, MMBI argues that, should the

Commission conclude that the evidence warrants revocation of MMBI's construction permit, the Commission's failure to comply with 5 U.S.C. § 558(c) fatally compromises this proceeding with respect to MMBI. In this regard, MMBI contends that its alleged actions do not fall within the exceptions to the statute's notice and opportunity provisions. MMBI further submits that the Bureau's LOI does not constitute the requisite notice and opportunity. MMBI's argument should be rejected.

33. The Commission has authority to revoke a construction permit pursuant to Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312. Section 312(a) provides that the Commission may revoke a permit for a variety of reasons including false statements knowingly made; conditions which, if known, would have warranted Commission refusal of a grant; or willful or repeated failures to comply with the Communications Act or the Commission's rules. Section 312(c) provides that, before revoking a permit, the Commission shall serve upon the permittee an order to show cause why an order of revocation should not be issued. Any such order to show cause shall set forth the matters about which the Commission is inquiring and give the permittee an opportunity to appear and give evidence. Section 312(d) imposes the burdens of proceeding with the introduction of evidence and proof upon the Commission. Section 312(e) provides that Section 9(b) [5 U.S.C. 558(c)(1) and (2)] of the Administrative Procedure Act applies to a revocation proceeding. Section 558(c) of 5 U.S.C. provides in pertinent part:

Except in cases of willfulness or those in which public health, interest or safety requires otherwise, the . . . revocation of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may

warrant the action: and
(2) opportunity to demonstrate or achieve compliance with all lawful requirement.

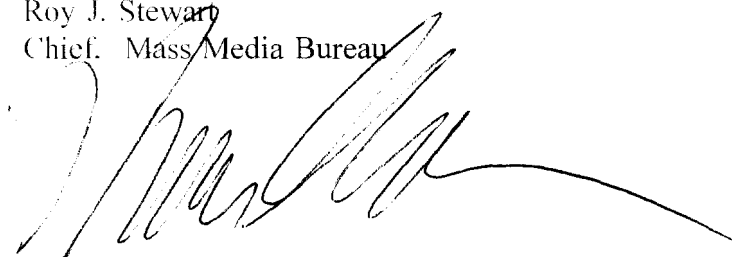
34. Section 1.91 of the Commission's Rules, 47 C.F.R. § 1.91, sets forth the procedures for the institution and conduct of revocation proceedings. Those procedures were followed here, and nothing in MMBI's argument suggests otherwise. Further, those procedures provide the framework for giving permittees such as MMBI all the notice and opportunity to which they are entitled prior to the revocation of a permit, and MMBI cites no case (and the Bureau is aware of none) which even hints that the procedures set forth in Section 1.91 do not comply with the statutory requirements for notice and opportunity.

35. The Bureau also notes that MMBI did not avail itself of the opportunity to seek reconsideration of the *HDO* pursuant to Section 1.106(a)(2) of the Commission's Rules, 47 C.F.R. § 1.106(a)(2), which permits a party to request that the presiding officer certify to the Commission the question as to whether, on policy in effect at the time of the designation or adopted since designation, and undisputed facts, a hearing should be held. MMBI did not file such a petition and therefore cannot now claim that it was denied its procedural rights.

II. Conclusion

36. In sum, the Bureau submits that Turro's and MMBI's misrepresentations and lack of candor to the Commission, their participation in an unauthorized transfer of control, and their violations of numerous Commission rules and the Communications Act of 1934, as amended, mandate their disqualification.

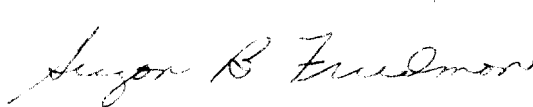
Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Norman Goldstein
Chief, Complaints & Political
Programming Branch



Alan E. Aronowitz



Suzan B. Friedman
Attorneys

Federal Communications Commission
2025 M Street, N.W., Suite 8210
Washington, D.C. 20554
(202) 418-1430

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